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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANGELO H. ROSSI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States District Court for the District of Oregon

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For Appellant.

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The plaintiff in error, hereinafter referred to as the defendant, sets out in his transcript of record thirty-four assignments of errors. In considering these we will endeavor to group them according to the questions involved.

I.

That the indictment is duplicitous in that it charges more than one crime, defendant's assignments I and XXXII.

The indictment charges that the defendants conspired to "commit the acts made offenses and crimes by the laws of the United States, to-wit: by sections 148, 151 and 154 of the Penal Code of the United States, and to defraud the United States." (Trans. p. 5.) Section 37, of the Penal Code makes it an offense "either to conspire to commit any offense against the United States, or to defraud the United States in any manner or for any purpose." The fact that the unlawful combination contemplated the consummation of acts that would constitute more than one violation of the criminal laws does not charge more than one offense. It is the conspiracy and not the overt acts done in pursuance thereof that is denounced by the statute. (United States vs. Eccles, 181 Fed. 906.) Nor is the charge in the indictment that the conspiracy was to commit certain offenses and to defraud a charge of more than one crime. Where the statute denounces several things as a crime, the different things in the statute be-

ing connected by the disjunctive "or," they may be joined in the same indictment by the conjunctive "and" without rendering the indictment bad for duplicity and a conviction will be sustained if the testimony shows the defendant to be guilty of either one or the other thing charged. (Ackley vs. United States, 200 Fed. 217.)

II.

That the indictment does not state facts sufficient to constitute an offense against the United States.

This part of assignment number I involves the question of whether or not the scheme or conspiracy alleged in the indictment would constitute a violation of sections 148, 151 and 154 of the Penal Code and includes assignments number XV, XVI, XIX, XX, XXIII, XXIV, XXV and XXVI.

The conspiracy itself is the gist of the offense and the sufficiency of the indictment is to be determined by the allegations charging conspiracy and not by the allegations charging the offenses to be committed in pursuance of the conspiracy. The offenses to be committed in pursuance of the conspiracy may be charged in general terms sufficient to inform the defendant of the charge against him and need not be described with the same accuracy of detail that would be required in an indictment for the commission of the offense itself.

> "The indictment in question, it is urged, is fatally defective by reason of an omission to directly particularize various elements,

claimed to be essential to constitute the offense of perjury and other elements necessary to be averred in respect of the alleged suborners.

"This is based upon the assumption that an indictment alleging a conspiracy to suborn perjury must describe not only the conspiracy relied upon, but also must, with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and perjury, which it is alleged is not done in the indictment under consideration. But in a charge of conspiracy the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy.

Williamson vs. United States, 207 U. S. 425.

"In all charges of conspiracy, the conspiracy itself is the gist of the offense, and where a conspiracy is charged to violate the laws of the United States, if the conspiracy be specifically alleged, it is not necessary to allege the details of the law of the United States to be violated with the accuracy it would be if the charge were directly of the violation of the law of the United States and not of the conspiracy to violate it."

United States vs. Dahl, 225 Fed. 909.

Lew Moy vs. United States, 237 Fed. 50.

Knauer vs. United States, 237 Fed. 8.

The charging part of the indictment (Trans. pp. 4-9) alleges that the defendant and others conspired

to commit the acts made offenses and crimes by sections 148, 151 and 154, of the Penal Code and to defraud the United States; that they were to falsely make and alter certain obligations and securities of the United States, to-wit: War Savings Certificates and War Savings Certificate Stamps, and to pass, publish, utter and sell said altered obligations and securities, and to have and keep the same in their possession and conceal the same with the intent to defraud the United States and others, and to buy, sell, exchange, transfer and deliver such falsely made and altered obligations with the intent and purpose that they be passed, published, and used as true and genuine, and to defraud the United States by presenting to the United States and causing the United States to redeem and purchase such falsely made and altered obligations and securities; that this scheme was to be carried out by certain conspirators stealing War Savings Certificates and War Savings Certificate Stamps and by removing the stamps from the certificates and by removing the registration and identification number from the face of the stamps; that other conspirators were to attach the stamps so removed and so altered to blank certificates and to sell, exchange, and pass the same, etc.

If this scheme, as set forth in the indictment, would be a violation of sections 148, 151 and 154 of the Penal Code and would defraud the United States, the indictment is sufficient, even though the language used in describing the scheme would not be sufficient in an indictment for a violation of the

above sections.

Section 148 of the Penal Code provides:

> "Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than five thousand dollars and imprisoned not more than fifteen years."

Section 151 of the Penal Code provides:

> "Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than five thousand dollars and imprisoned not more than fifteen years."

Section 154 of the Penal Code provides:

> "Whoever shall buy, sell, exchange, transfer, receive, or deliver any false, forged, counterfeited, or altered obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any Act of Congress, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both."

War Savings Certificates are obligations and securities of the United States. Section 6, of the Act of September 24, 1917; 40 Stat. L. 291, provides:

"Sec. 6. That in addition to the bonds authorized by section 1 of this Act and the certificates of indebtedness authorized by section 5 of this Act, the Secretary of the Treasury is authorized to borrow from time to time, on the credit of the United States, for the purposes of this Act and to meet public expenditures authorized by law, such sum or sums as in his judgment may be necessary, and to issue therefor at such price or prices and upon such terms and conditions as he may determine, war savings certificates of the United States on which interest to maturity may be discounted in advance at such rate or rates and computed in such manner as he may prescribe. Such war savings certificates shall be in such form or forms and subject to such terms and conditions, and may have such provisions for payment thereof before maturity, as the secretary of the Treasury may prescribe. Each war saving certificate so issued shall be payable at such time, not exceeding five years from the date of its issue, and may be redeemable before maturity, upon such terms and conditions as the Secretary of the Treasury may prescribe . . . The Secretary of the Treasury may, under such regulations and upon such terms and conditions as he may prescribe, issue, or cause to be issued, stamps to evidence payemnts for or on account of sueh certificates.

Pursuant to this Act, the Secretary of the Treasury issued certain regulations, among which are the following contained in Treasury Department Circular No. 94:

"A United States war Saving Certificate, Series of 1918, will be an obligation of the United

States, when, and only when, one or more United States War Savings Certificate Stamps, Series of 1918, shall be affixed thereto. Each of such War Savings Certificates will have spaces for 20 War Savings Certificate Stamps, Series of 1918, and each of such stamps thereto affixed will have a maturity value of $5 on January 1, 1923, which will accordingly give each such certificate, when bearing its full complement of such stamps, a maturity value of $100 on said date. No War Savings Certificates shall be issued unless at the same time one or more War Savings Certificate Stamps shall be purchased and affixed thereto, but no additional charge will be made for the War Savings Certificate itself. The name of the owner of each War Savings Certificate must be written upon such certificate at the time of the issue thereof."

"War Savings Certificates may be registered without cost to the owners at any postoffice of the first, second, or third class, subject to such regulations as the Postmaster General may from time to time prescribe, and payment in respect to any certificate so registered will be made only at the postoffice where registered. Unless registered, the United States will not be liable if payment in respect of any certificate or certificates be made to a person not the rightful owner thereof."

and the following contained in Treasury Department Circular No. 108:

"A War Savings Certificate which has been lost or destroyed will not be paid nor will a duplicate thereof be issued, unless the certificate has been registered in accordance with the regu-

lations and instructions issued by the Postmaster General. In the event of the loss or destruction of a registered certificate, the registrant may apply to the postoffice where the certificate was registered, on forms prescribed by the Postmaster General, either for the issuance of a duplicate certificate or for the payment thereof. On being satisfied of the facts as to the loss or destruction, the Secretary of the Treasury will, after not less than three months have elapsed from the time of application, authorize payment, or the issuance to the registered owner of a duplicate certificate, to be so marked, on which shall be noted the number of registered stamps affixed to the original certificate, with the proper notation of registration. Such certificate shall receive a new registration number. The Secretary of the Treasury may, in special cases, where he deems the facts wararnt such action, require the claimant to give a bond of indemnity with approved thereafter on the old certificate. The duplicate certificate when issued shall stand in the place and stead of the original lost or destroyed certificate for all purposes. After the issuance of a duplicate certificate, the original shall cease to have validity for any purpose, and if recovered shall be returned to the postoffice of registration for cancellation. No duplicate certificate will be issued after the maturity of the original."

Pursuant to the regulations of the Secretary of the Treasury, the Postmaster General made certain regulations for the registration of certificates and stamps, among which is the following appearing in

Postoffice Department circular No. 3348:

> "The number of the postoffice and the registrant's number shall be written or stamped acros the face of each war saving certificate stamp registered."

The scheme outlined in the indictment is a scheme to alter and deal in altered obligations of the United States, as every stamp removed from a certificate decreased the value of the certificate and altered the obligation. So is the removal of the registration and identification numbers from the stamps themselves an alteration of an obligation. The Act of September 24, 1917, refers to the certificates and the regulations of the Secretary of the Treasury specifically say that the certificate is an obligation only when one or more stamps are attached, both the Act and the regulations provide for stamps as evidences of payment on the certificates and as such evidences of payment they are representatives of value and come within section 147 of the Penal Code.

> "Sec. 147. The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress."

Whenever a stamp is registered pursuant to these regulations the government is obligated to pay the owner of that stamp its value, even though the stamp be lost or destroyed. When it is registered, the stamp itself represents an obligation of the government to the registered holder. That particular obligation is identified by means of "the postoffice number and the registrant's number . . . written or stamped across the face . . ." A removal of the stamp from its certificate and a removal of the registration and identification number from the stamp and the attaching of the stamp to a blank certificate, results in the government paying twice for the same obligation. The presenting of a stamp so removed and altered and attached to another certificate causes the government to recognize an obligation that it would not recognize with the original registration and identification number left on the stamp. The scheme as alleged in the indictment, is not only a scheme to alter obligations of the United States but is also a scheme to defraud the United States.

III.

That the testimony of W. R. Bryon, a government officer, and P. A. Young, foreman of the Grand Jury, concerning admissions of the defendant, is not admissible because another government officer had previous promised the defendant immunity from prosecution, covered by defendant's assignments

numbered III, IV, V, VI, VII, VIII, IX, XI, XII, XVII, XXII and XVIII.

The testimony of Bryon was admitted and then stricken out and the jury instructed to disregard it (Trans. pp. 166-167), and the only alleged error that need be considered in that connection is assignment numbered XII "That . . . the trial court erred in failing to grant a mistrial on the ground of the highly prejudicial testimony of Bryon before the trial jury." It will be noted that the testimony of Bryon concerning what the defendant said to him concerning the defendant's connection with the crime (Trans. pp. 79-107) is the same as the testimony of the witness Young, concerning what the defendant said in the grand jury room (Trans. pp. 107-118). If the testimony of Young is admissible, the same facts remain before the jury and the defendant could not have been prejudiced by Bryon's testimony.

There is but one question to determine in passing upon the admissibility of a confession, and that is whether or not the confession was voluntary and not induced by promises or threats of any kind.

> "In approaching the adjudicated cases for the purpose of endeavoring to deduce from them what quantum of proof, in a case presented, is adequate to create, by the operation of hope or fear, an involuntary condition of mind, the difficulty encountered is that the decided cases necessarily rest upon the state of facts which existed in the particular case, and, therefore, furnish no certain criterion,

since the concluson that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different although somewhat similar condition of fact. . . .

"The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent."

Bram vs. United States, 168 U. S. 532.

Whether or not improper influences were used in bringing about the confession is a question for the trial judge to determine from all the surrounding circumstances.

"The admissibility of such evidence so largely depends upon the circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion."

Hopt vs. Utah, 110 U. S. 574.

The defendant came before the grand jury of his own accord and was warned that whatever he might say would be used against him (Trans. pp. 107-108). He had been previously informed by the attorney in charge of the investigation that he was not required to reveal anything (Trans. p. 97). Yet counsel asks the court to say, as a matter of law, that at the time the defendant appeared before the grand jury he was acting under inducement; that his statements were not voluntarily made, but were made in reliance upon a promise of immunity given by an officer some time previous. Is there any reason to believe that he placed more reliance on the officer promising him immunity than he did on the foreman of the grand jury or the attorney in charge of the prosecution who had told him before that he was not required to tell anything and that he was not promised anything? (Trans. p. 97). There is no statement from the defendant to that effect and there is nothing in the record to indicate that the defendant was acting under the influence of the promise of immunity. The record shows that the defendant was suspicious of the promise of immunity; that he said that he had been "double-crossed before, and he was a little bit afraid." (Trans. p. 132); that he was in the office of the officer who made him the promise of immunity when that officer was told by the prosecuting officer that "I will have to throw that friend of yours, Rossi, in the can." (Trans. p. 137); that this all took place before the grand jury met (Trans. p. 138), and that

this officer knew that his promise of immunity was not to be kept. (Trans. p. 138.) The officer who made the promise was a witness for the defense (Trans. p. 128) and there is nothing in his testimony to show that he did not tell the defendant that his promise of immunity would afford no protection. The defendant himself was present at the trial and could have told why he went before the grand jury, but there is nothing except counsel's assertion that the testimony before the grand jury was induced by the promise of immunity. The events that transpired prior to the meeting of the grand jury were sufficient to put a man who was having his first experience in criminal procedure on his guard and certainly could not mislead one who had been "double-crossed before."

IV.

That the defendant did not have a fair trial by reason of certain newspaper articles which were prejudicial (Trans. pp. 148-149).

It does not appear that any of these articles were ever read by the jury nor does it appear that the defendant made any objection to them prior to the verdict. It does appear, however, that a certain article which does not seem to be included in defendant's exhibits was called to the court's attention by counsel for another defendant and that the court instructed the jury at that time to disregard it. Trans. p. 140.) It further appears that at the close of the case

the court instructed the jury in no uncertain terms to disregard all such articles. Exhibits "A" and "B" appear to have been published prior to the trial and Exhibit "H" appears to have been published after the case went to the jury. It does not appear that counsel examined the jurors on the articles published prior to the trial or whether or not they had read them or would be influenced by them.

All of these articles were submitted to the trial court in a motion for a new trial. (Trans. p. 42.) The trial court had the opportunity to consider them in the light of all the surrounding circumstances and discretion of the trial court in denying a motion for a new trial based on such grounds will not be reviewed in the absence of conclusive ground that he was wrong. (Holt vs. United States, 218 U. S. 245).

V.

That the court erred in admitting the testimony of Miss Daisy Buckner, postmistress at Scio, Oregon, assignment number 11.

Miss Buckner testified that certain persons applied to the Scio, Oregon, postoffice for replacement of stamps lost on March 3, 1920; that the registration number of the Scio office was 50819; and that stamps were registered by stamping the numbers across the face with a rubber stamp, giving the size of the stamp and indicating where placed on the stamp. (Trans. pp. 71-79.)

It will be noted that the names of persons apply-

ing to the Scio office for replacement of stamps is the same as the names of persons alleged in the indictment as being the owners of stamps stolen by defendant; that the number placed on their stamps is the same number the indictment alleges was removed. The testimony of this witness does not in any particular vary from the allegations in the indictment. The objection was based on the ground that there is no allegation that the stamps were registered, but the indictment alleges that a registration number was removed and an additional allegation that such a number was on the stamps before it was removed would add nothing to the information of defendants concerning the crime with which they were charged.

VI.

That the court erred in charging the jury in effect that the possession of recently stolen property affords a strong inference that the property was stolen by the person having it in his possession, Assignment XVIII.

This instruction correctly states the law.

> "Possession of the fruits of crime recently after its commission, justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted in some way consistent with innocence."
>
> Wilson vs. United States, 162 U. S. 613.

That no issue has been joined herein in that the defendant has never pleaded to this indictment; and that because of which said errors in the record herein, no lawful judgment can be rendered by the court upon the record in this case, Assignment XXXII.

This objection is answered by the case of Garland vs. State of Washington, 232 U. S. 642:

> "The Supreme Court of Washington, following its former decisions, held that the failure to enter a plea had deprived the accused of no substantial right, and that having failed to make objection upon that ground before trial it was waived and could not be subsequently taken. . . . It is insisted, however, that this court in the case of Crain vs. United States, 162 U. S. 625, held the contrary. In that case the question was specifically made as to the necessity of a plea before trial, duly entered of record. The learned Justice who spoke for the majority of the court announced its conclusion approving a number of early cases in the state courts which had held that such form of arraignment entered of record was essential to a legal trial and holding that in a Federal court no valid trial could be had without the requisite arraignment and plea and that such must be shown by the record of conviction. If a legal trial cannot be had without a plea to the indictment duly entered of record before trial, it would follow that such omission in the present case requires a reversal of the judgment of conviction, because the prisoner has been deprived of due process of law.
>
> "Technical objections of this character were undoubtedly given much more weight formerly

than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the presentation of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges of the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation which now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain case, when he said (p. 649):

"'Here the defendant could not have been injured by an inadvertance of that nature. He ought to be held to have waived that which under the circumstances would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if the defendant had been duly arrainged, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.'

> "Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the Crain case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed it is necessarily overruled."

This decision is followed in the case of Shidler vs. United States, 257 Fed. 620.

VIII.

Assignment number XXX alleges as error a certain remark made by the trial court to a witness for the defense.

There was no objection made to this remark at the time it was made and the record fails to disclose wherein it prejudiced the defendant. It does not relate to the credibility of the witness, nor is it a comment on the evidence. The record does not disclose whether counsel considered the remark a reflection on the witness or on the defendant, but in any event, if the jury received any impression from the court's remark, it was fully covered by the instructions. (Trans. pp. 176-177.)

IX.

Defendant in assignment XXIV alleges that it was error for the court to refuse to instruct, among other things, that the removal of a serial number

from a certificate is not an alteration of an obligation of the United States.

Such an instruction is clearly erroneous. There is no allegation in the indictment or is there any evidence that a serial number was removed. Such an instruction is on matters entirely outside the issue and could only have the effect of confusing the jury. The indictment and proof is concerned wholly with the removal of registration and identification numbers from the stamps.

X.

Assignment XXVII alleges that it was error for the court to refuse to give certain instructions regarding newspaper articles published during the trial.

Such an instruction was given (Trans. pp. 148-149) and it is not error for the court to refuse to use the particular language of counsel. The instruction given is complete and covers all points in the requested instruction.

Respectfully submitted,

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